

**Letter of Findings Number: 04-20120463 & 04-20120465**  
**Sales and Use Tax**  
**For Tax Years 2009, 2010, 2011**

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**ISSUE**

**I. Sales Tax – Imposition – Exemption Certificates.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-8-8; IC § 6-8.1-5-1; IC § 6-2.5-9-3; [45 IAC 2.2-8-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the assessment of Indiana sales tax.

**STATEMENT OF FACTS**

Taxpayer operates three gas stations/convenience stores in Indiana. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the tax years 2009, 2010 and 2011. Pursuant to the audit, Taxpayer was assessed Indiana sales tax on taxable sales for which Taxpayer had neither collected nor remitted Indiana sales tax. Taxpayer protested the assessments arguing that some of the transactions were exempt from sales tax. A hearing was held and this Letter of Findings ensues addressing protests under two docket numbers. Docket number 04-20120463 addresses sales from January 2009 through April 2011 where Taxpayer filed returns for its sales tax activities under location 001. Docket number 04-20120465 addresses sales from May 2011 through December 2011 where Taxpayer filed returns for its sales tax activities under location 900.

Additional facts will be provided as necessary.

**I. Sales Tax – Imposition – Exemption Certificates.**

**DISCUSSION**

The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC § 6-8.1-5-1(b), (c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

The Department's audit proposed an adjustment to assess Indiana sales tax on sales of diesel fuel for which Taxpayer did not have exemption certificates.

IC § 6-2.5-4-1(a)-(c) defines a "retail merchant" involved in "retail transactions," as follows:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
  - (1) acquires tangible personal property for the purpose of resale; and
  - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
  - (1) the property is transferred in the same form as when it was acquired;
  - (2) the property is transferred alone or in conjunction with other property or services; or
  - (3) the property is transferred conditionally or otherwise.

Accordingly, a retail merchant performing retail transactions is a person who obtains and sells tangible personal property. Pursuant to IC § 6-2.5-2-1(a), retail transactions that are made in Indiana are subject to the state gross retail tax ("sales tax"). Moreover, "the retail merchant is required to collect the tax [due on the retail transaction] as [an] agent for the state." IC § 6-2.5-2-1(b). Furthermore, the retail merchant "has a duty to remit Indiana [sales] or use taxes... to the department, [to] hold those taxes in trust for the state, and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3(2).

Therefore, Taxpayer, as a retail merchant, has a duty to collect and remit sales tax on its sales of tangible personal property. When Taxpayer fails to collect and hold the taxes in trust for the state, Taxpayer is personally liable for the sales tax, interest, and penalties due to the state for those sales. The Department's audit determined that for the years at issue, Taxpayer did not have exemption certificates for 284 of the transactions Taxpayer claimed were exempt. The Department's auditor allowed Taxpayer time to acquire exemption certificates from its customers. Taxpayer was able to document most of the transactions at issue; however some of the 284 transactions remained undocumented and therefore the Department's audit assessed sales tax on those transactions.

Taxpayer protests that some of the sales upon which the Department considered sales tax to be due were actually exempt sales. After the hearing Taxpayer presented additional exemption certificates for some of the

transactions on which the Department's audit assessed sales tax. Pursuant to IC § 6-2.5-8-8:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
- (b) The following are the only persons authorized to issue exemption certificates:
  - (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
  - (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and
  - (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
- (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.  
(Emphasis added).

In addition, [45 IAC 2.2-8-12](#) provides:

- (a) Exemption certificates may be issued [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [[IC 6-2.5](#)] may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [[IC 6-2.5](#)] with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.
- (b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.
- (c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.
- (d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.
- (e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.
- (f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.
- (g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.
- (h) Exemption certificates may be reproduced provided no change is made in the wording or content.  
(Emphasis added).

As provided by IC § 6-2.5-8-8(a), a seller accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. Taxpayer has now provided six additional exemption certificates relating to six transactions listed in the audit as taxable (highlighted on Taxpayer's attached copy of the audit summary). The Department will remove those purchases by those customers from the list of taxable sales and the amount of sales tax due will be recalculated accordingly.

#### **FINDING**

Taxpayer's protest is sustained.

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